In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-187

SQUARE D COMPANY, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This suit was brought by the Secretary of Labor to enjoin the petitioner from withholding wages due to certain female employees in violation of 29 U.S.C. 206(d) (Section 6(d) of the Fair Labor Standards Act), which forbids discrimination between employees on the basis of sex by paying women lower wages than men for work requiring equal skill, effort and responsibility. Petitioner claimed that in the jobs involved (machine operator and assembler) the higher paid classes required greater effort and responsibil-

ity, and that since March 1, 1966, jobs in the higher paid categories had been made available to women as vacancies occurred. Finally, petitioner contended that there could be no recovery for unpaid wages accruing after March 1, 1966, the date on which it instituted its current pay plan in claimed reliance on a letter from the Regional Director of the Department of Labor.[1] That letter was the culmination of an investigation by the Department which led to the substitution of the current job classifications for the former, openly discriminatory, categories. The letter stated "we are not prepared to say that the proposed pay plan would contravene the equal pay provisions of the Fair Labor Standards Act * * *. You realize, of course, that the courts might construe the equal pay requirements differently in situations such as those involved here" (Pet. App. 22).

After discussion of the various requirements of the job classifications involved, the district court found that the differences between the classes of the jobs involved "are insubstantial and minor and not those ordinarily associated with differences in wage levels" (Pet. App. 6). The court then rejected petitioner's contention that the availability to women of jobs in the more highly paid classes constitutes com-

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[1] Section 10(a) of the Portal-to-Portal Act (29 U.S.C. 259 (a)) relieves an employer from liability for failure to pay wages as required by the Fair Labor Standards Act if he relies on a written interpretation of an agency specified in subsection (b). Subsection (b) defines "agency" for Fair Labor Standards Act cases as the Administrator of the Wage and Hour Division of the Department of Labor.

pliance with 29 U.S.C. 206(d).[2] Finally, the court concluded that petitioner's reliance on the letter from the Regional Director was a good defense against claims for back wages accruing after March 1, 1966.

The court of appeals affirmed the rulings adverse to petitioner, noting that the district court properly applied the statutory standards to the facts, and that its findings of fact were clear, sufficient, and supported by the evidence (Pet. App. 19-20). The court of appeals reversed the judgment below insofar as it found that petitioner was entitled to rely on the Regional Director's letter, since 29 U.S.C. 259(a) and (b) read together permit reliance only on a writing of the Administrator of the Wage and Hour Division of the Department of Labor in circumstances such as those here.

Petitioner urges in this Court the same contentions considered and correctly decided by the court below. None merits further review.

1. Petitioner's claim that the district court's findings of fact were inadequate is without substance. There is no conflict among the circuits, and citations to cases in other circuits in which the findings of fact were adequate or inadequate do not establish such a conflict. There is certainly no " 'exceptional showing of error' " warranting this Court's review of

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[2] In fact, the evidence showed that as of May 1, 1968, out of approximately 180 jobs in the highest pay classification, only 1 was held by a woman whereas all the 337 lower pay classification jobs were held by women (Appendix in the Court of Appeals, 332, 341-342, 598, 599).

concurrent findings of fact by two courts below. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

2. The courts below were also clearly correct in concluding that the availability of the more highly paid jobs to women when vacancies occurred did not cure past violations. Since the obligation under the Act is to give equal pay for equal work, that obligation is not satisfied by agreeing to allow some of the women to receive the higher rate of pay for the same work as vacancies occur. The decision below is in accord with all other appellate decisions which have considered this question. See, *e.g.*, *Shultz* v. *American Can Co.-Dixie Products*, 424 F.2d 356, 359 (C.A. 8), relied upon by both courts below, and *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 226-227 (C.A. 7). See also *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 265 (C.A. 3), certiorari denied, 398 U.S. 905; *Shultz* v. *First Victoria National Bank*, 420 F.2d 648, 658-659 (C.A. 5).

3. Petitioner's claim that the decision below erroneously interprets Section 10 of the Portal-to-Portal Act is fully refuted by the statutory terms and the legislative history, as well as by the longstanding administrative interpretation—all fully reviewed in the opinion below (Pet. App. 23-27). On this point, also, the decision below is in accord with the uniform view of all the courts of appeals which have considered the issue.[3]

[3] In addition to the decisions of the Tenth, Seventh and D.C. Circuits, cited in the opinion below (Pet. App. 26-27), there

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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is a recent decision in the Fifth Circuit, *Hodgson* v. *Royal Crown Bottling Co.*, No. 71-3005, decided August 18, 1972, not yet officially reported, as well as two more decisions in the Seventh Circuit: *King* v. *Board of Education of Chicago*, 435 F. 2d 295, certiorari denied, 402 U.S. 908; and *Sprogis* v. *United Air Lines*, 444 F. 2d 1194, certiorari denied, 404 U.S. 991.

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